Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-841

In The

Supreme Court of the United States

VAUGHAN ROOFING & SHEET METAL, L.L.C.,

Petitioner,

v.

ANTONIO GARCIA RODRIGUEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

KIRK L. LANDRY
Counsel of Record
KEOGH, COX AND WILSON, LTD.
701 Main Street
Baton Rouge, LA 70802
klandry@kcwlaw.com
Phone (225) 383-3796
Fax (225) 343-9612

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Illegal aliens are prohibited from working in the United States by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1101, et seq., especially at § 1324a. Awards of back pay to illegal aliens by the N.L.R.B. have been held to violate IRCA because such awards constitute a substitute for wages that could not have been lawfully earned. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002). In all 50 states a legally employed worker who is injured on the job is entitled to receive workers compensation benefits comprised of medical and wage replacement components. However, the courts of multiple states are split on the availability of such payments to illegal aliens because of IRCA.

The question presented is whether IRCA preempts state law awards of workers compensation benefits to illegal aliens, particularly payments for replacement of wages that could not have been lawfully earned.

LIST OF PARTIES

The name of the Petitioner is:

Vaughan Roofing & Sheet Metal, L.L.C.

The name of the Respondent is:

Antonio Garcia Rodriguez

The names of the other parties are:

Jason Stanton

Louisiana Workers' Compensation Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Petitioner Vaughan Roofing & Sheet Metal, L.L.C. files this Corporate Disclosure Statement and declares that it has no parent corporation and that no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	4
The courts of numerous states are split over whether the IRCA prohibition against employing illegal aliens preempts an award of workers compensation benefits to an illegal alien, in whole or in part. Resolution of this recurring issue will provide uniformity and continuity to workers compensation systems nationwide	4
CONCLUSION	11

APPENDIX

May 5, 2010 Judgment and Opinion of the Louisiana Court of Appeal, Third Circuit for *Antonio G. Rodriguez v. Integrity Contracting, et al.*	App. 1

TABLE OF CONTENTS – Continued

Page

May 5, 2010 Judgment and Opinion of the Louisiana Court of Appeal, Third Circuit for *Antonio Garcia v. State of Louisiana* ..... App. 38

May 5, 2010 Judgment and Opinion of the Louisiana Court of Appeal, Third Circuit for *John W. Stanton, et al. v. Louisiana Workers' Compensation Corporation, et al.* ..... App. 41

February 27, 2009 Judgment State of Louisiana, Office of Workers' Compensation ..... App. 44

February 27, 2009 Reasons for Judgment State of Louisiana, Office of Workers' Compensation ..... App. 46

September 24, 2010 Denial of Writ of Certiorari and/or Review of the Louisiana Supreme Court ..... App. 52

8 U.S.C.A. § 1324a ..... App. 53

Excerpts of Pretrial Memorandum of Facts and Law of Vaughan Roofing & Sheet Metal, L.L.C. filed in the State of Louisiana, Office of Workers' Compensation ..... App. 61

Excerpts of Application for Supervisory Writ and/or Writ of Certiorari of Vaughan Roofing and Sheet Metal, L.L.C. ..... App. 66

TABLE OF AUTHORITIES

Page

CASES

Continental PET Technologies, Inc. v. Palacias, 546 U.S. 825, 126 S. Ct. 362, 163 L. Ed. 2d 69 (2005) 10

Continental PET Technologies, Inc. v. Palacias, 604 S.E.2d 627 (Ga. Supr. Ct. 2004) 10

Correa v. Waymouth Farms, 664 N.W.2d 324 (Minn. Supr. Ct. 2003) 9

Granados v. Windson Development Corp., 509 S.E.2d 290 (Va. Supr. Ct. 1999) 6, 7

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) 4, 8, 9, 10

Marboah v. Ackerman, 877 A.2d 1052 (D.C. Ct. App. 2005) 7

Reinforced Earth Company v. Workers' Compensation Appeal Board, 810 A.2d 99 (Pa. Supr. Ct. 2002) 8

Rios v. Ryan, Inc., 542 S.E.2d 790 (Va. Ct. App. 2001) 7

Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) 8

Tarango v. State Industrial Insurance System, 25 P.3d 175 (Nev. Supr. Ct. 2001) 7

FEDERAL CONSTITUTION AND STATUTES

United States Constitution, Art. VI, Clause 2 ..... 2, 5

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C.A. § 1324a 2

28 U.S.C. § 1257a 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, Vaughan Roofing and Sheet Metal, L.L.C., petitions the Court for a Writ of Certiorari to review a final judgment of the Louisiana Supreme Court (entered September 24, 2010) denying a writ of certiorari and/or review to the Louisiana Court of Appeal, Third Circuit.

OPINIONS BELOW

The denial of the writ of certiorari and/or review of the Louisiana Supreme Court can be found at 2010-1307 (La. 9/24/10), 45 So.3d 1076 and a copy is included in the Appendix at 52. The opinion of the Louisiana Court of Appeal, Third Circuit can be found at 2009-1537 (La. App. 3 Cir. 5/5/10), 38 So.3d 511, and a copy is included in the Appendix at 1. Additionally, the Court of Appeal disposed of the parallel cases by simply referencing the primary opinion, but out of an abundance of caution those are included in the Appendix at 38 and 41. Finally, the Judgment and Reasons for Judgment of the State of Louisiana, Office of Workers Compensation are unreported and are included in the Appendix at 44 and 46.

STATEMENT OF JURISDICTION

The judgment of the Louisiana Supreme Court was entered on September 24, 2010. *See* App. at 54.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8 U.S.C.A. § 1324a: included in the Appendix at 53.

United State Constitution, Art. VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Although the question presented in this Petition is not fact driven, some limited background is helpful for context and to frame the issue.

Antonio Garcia Rodriguez (sometimes "Rodriguez") is an illegal alien. He was injured while performing roofing work at the University of Louisiana-Lafayette for his direct employer Jason Stanton d/b/a Integrity Contracting (sometimes "Stanton"). At the time Stanton was a subcontractor to petitioner Vaughan Roofing & Sheet Metal, L.L.C. (sometimes "Vaughan").

Rodriguez is a native of Mexico. He admits he was not legally in this country at the time of his accident. Rodriguez did not work directly for Vaughan. Vaughan did not know of Rodriguez' illegal status and was not involved in any way in his hiring or in any aspect of his employment relationship with Stanton.

After his accident Rodriguez asserted a claim for workers compensation benefits against Stanton. Because of a dispute between Stanton and his workers compensation insurer involving policy cancellation issues, Rodriguez sought workers compensation benefits from Vaughan as a "statutory" employer. Louisiana, like most other states, allows employees to seek workers compensation benefits from a principal contractor, which typically occurs only when a direct employer refuses or is unable to pay workers compensation benefits. Rodriguez sued Vaughan only in that capacity, not as a direct employer.

Throughout these proceedings Vaughan has asserted that federal law prevents an illegal alien from being an employee of Vaughan and therefore from receiving workers compensation benefits. More particularly, the application of IRCA as a bar to recovery was specifically urged to the trial court in Vaughan's Motion for Summary Judgment and in Vaughan's Pretrial Memorandum of Facts and Law (App. at 56). The issue was considered and denied at the trial on the merits by the workers compensation judge (App. at 46). It was raised again at the intermediate appellate level and was addressed by the

Court of Appeal in its published appellate decision, 2009-1537 (La. App. 3rd Cir. 5/5/10), 38 So.3d 511, a copy of which is also included in the Appendix at 1. The issue was further raised at the Louisiana Supreme Court (App. at 61), which was denied by a split vote of the justices, 2010-1307 (La. 9/24/10) 45 So.3d 1076, a copy of which is also included in the Appendix at 52.

REASON FOR GRANTING THE WRIT

The courts of numerous states are split over whether the IRCA prohibition against employing illegal aliens preempts an award of workers compensation benefits to an illegal alien, in whole or in part. Resolution of this recurring issue will provide uniformity and continuity to workers compensation systems nationwide.

The Immigration Reform & Control Act of 1986 (IRCA) 8 U.S.C. §§ 1101, et seq., at 1324a is a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002). "IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman*, 535 U.S. at 147. "Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit Congressional policies." *Hoffman*, 535 U.S. at 148.

Workers Compensation laws in all states provide varying levels and types of medical and wage replacement benefits to legally employed workers who may be injured in the course and scope of their employment. There is typically no requirement that an employee prove negligence or fault in order to recover. The medical benefits component provides full coverage to the employee. The wage replacement component usually provides for a percentage of an employee's preinjury wage level to be paid out for a specified duration or until the employee returns to work or is shown to be employable. Fundamental to the obligation for payment of workers compensation benefits is that an actual employee-employer relationship exists.

The Supremacy Law Clause of the United States Constitution, Art. VI, Clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, to the extent that the law of any state explicitly includes illegal aliens as employees, such laws are necessarily preempted by the application of the supremacy clause to IRCA. Congress specifically forbade the establishment of an employment relationship between an employer and an illegal alien. The same logic applies in Louisiana and other states

where courts have held that workers compensation laws are applicable to illegal aliens because the respective legislatures did not specifically exclude them. In these states there is no preemption of any particular statute, but instead the application of the statutes to include illegal aliens is preempted. The court rulings in these "include by failure to exclude" states are particularly problematic because those courts are presumed to have been aware of expressed immigration policy of the United States as enacted by Congress in IRCA precluding the employment of illegal aliens.

To date, a dozen or more States have considered and decided this issue at various reported appellate levels, with many different results. Because these decisions were all made at the state level, none provide precedent for any other state, resulting in an inconsistent and haphazard approach to analyzing issues of constitutional law and federal statutory interpretation. Such issues are more properly resolved by this court. Failure to address and resolve these inconsistencies and conflicts on a nationwide basis can only lead to future litigation in the remaining states that have not yet been presented with this issue but most certainly will be. Examples of a few of the varying state results are set forth in the following paragraphs, although a complete list is beyond the scope and page limitations of this Petition.

The Supreme Court of Virginia, in *Granados v. Windson Development Corp.*, 509 S.E.2d 290 (Va. Supr. Ct. 1999), held that Granados, as an illegal

alien, was not eligible to receive workers compensation benefits as an employee because any contract of hire he may have had was void and unenforceable due to the IRCA prohibition against an illegal alien being employed lawfully in the United States. *Granados*, 509 S.E.2d at 293. While the Virginia legislature subsequently amended its statutory scheme to explicitly include illegal aliens, that amendment has been held not to be retroactive. Further, there appears to be no subsequent jurisprudence challenging the current version of the law on IRCA preemption grounds and, contrarily, subsequent jurisprudence affirms the ruling. *Rios v. Ryan, Inc.*, 542 S.E.2d 790 (Va. Ct. App. 2001).

The District of Columbia Court of Appeals, the court of last resort established by Congress for the District, also affirmed the holding of *Granados*. *Marboah v. Ackerman*, 877 A.2d 1052 (D.C. Ct. App. 2005). In a legal malpractice claim, the court affirmed the inability of an illegal worker to recover damages from his lawyer for failure to timely file his Virginia workers compensation claim. The Court noted that the *Granados* holding foreclosed his worker's compensation claim because he was an illegal alien.

Similarly, the Supreme Court of Nevada, in *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. Supr. Ct. 2001) concluded, that IRCA preempts the Nevada Industrial Insurance Act (Nevada's workers compensation law). More particularly, the Court determined that IRCA's prohibition against employing illegal aliens precluded an award

of vocational rehabilitation services (a form of workers compensation benefits) to an illegal alien.

Still further, the Michigan Court of Appeals, in *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003), determined that under IRCA it was a crime for an illegal alien to be employed in the United States. As such, an illegal alien was precluded from receiving workers compensation benefits. Because the employer "could not legally retain (Sanchez) or find (him) other work, plaintiffs became unable to perform work because of the commission of a crime." The Court found that "this result is in accord with the policy of the federal government as set forth in *Hoffman* . . . ." In reaching this result, the Michigan court denied the illegal alien further wage benefits under the Michigan workers compensation scheme.

On the other hand, the Supreme Court of Pennsylvania, in *Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A.2d 99 (Pa. Supr. Ct. 2002), rejected the employer's argument that IRCA preempted Pennsylvania law and precluded an award of benefits to an illegal alien. Notably though, in a lengthy dissent joined by another court member, Justice Newman addressed his view of the application of *Hoffman* and IRCA to Pennsylvania workers compensation claims:

> The preferable course is to announce, as a matter of public policy consistent with federal immigration law that unauthorized aliens are not eligible for workers' compensation benefits. One who obtains employment in a

> manner contrary to federal law should not benefit from that illegal employment relationship.

Similarly, the Supreme Court of Minnesota held that IRCA does not preempt the authority of states to award workers compensation indemnity benefits to illegal aliens. *Correa v. Waymouth Farms*, 664 N.W.2d 324 (Minn. Supr. Ct. 2003). However, Justice Gilbert strenuously dissented, noting:

> "Moreover, the policy considerations articulated in *Hoffman* (citation omitted) are applicable here. As the United States Supreme Court recognized, Correa cannot conduct a diligent job search "without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers." (citation omitted). In addition, awarding Correa continuing temporary total disability benefits predicated on a diligent job search would reward him for remaining in the United States illegally and encourage him to violate the IRCA by finding further employment. This result "trivializes" the immigrations laws. (citation omitted). In support of its holding, the majority adopts the rationale of the dissent in *Hoffman*. However, the dissent did not carry the day in *Hoffman*. We should not disregard the law of the land as articulated by the *Hoffman* majority and elevate the dissent over the majority opinion to reach a desired result in this case."

The Georgia Supreme Court has also held that IRCA does not preempt its state workers compensation laws, thus finding an award to illegal aliens is permissible. *Continental PET Technologies, Inc. v. Palacias*, 604 S.E.2d 627 (Ga. Supr. Ct. 2004). Notably, the employer was denied review by this court. *Continental PET Technologies, Inc. v. Palacias*, 546 U.S. 825, 126 S. Ct. 362, 163 L. Ed. 2d 69 (2005). But, examination of its Petition reveals that the question presented was directed solely to Georgia law as was the argument. In the instant Petition, the question presented applies to all 50 states instead of the intrastate disputes of the courts of a single one.

Even if the supremacy clause does not require state workers compensation systems to yield in their entirety to IRCA, those statutes or those interpretations of such acts addressing wage replacement awards certainly must. In *Hoffman*, this Court established a balancing approach which excluded an award of back pay but left other remedies intact. This same approach has been adopted by various state and federal courts interpreting claims by illegal aliens for lost wages in state law tort claims and other litigation seeking wage based recoveries. Utilizing such an approach in workers compensation claims would prevent illegal aliens from receiving wage replacement benefits, but would not preclude them from other workers compensation remedies, notably medical benefits. While not a perfect solution, it is one that

could accommodate both the interests of injured workers and federal immigration policy.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

KIRK L. LANDRY
Counsel of Record
KEOGH, COX AND WILSON, LTD.
701 Main Street
Baton Rouge, LA 70802
klandry@kcwlaw.com
Phone (225) 383-3796
Fax (225) 343-9612

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT
P.O. Box 16577
Lake Charles, LA. 70616
(337) 433-9403

Hon. Sharon Morrow
Hearing Officer, WC
556 Jefferson St., First Floor
Lafayette, LA 70501

Gregory Edgar Bodin
Baker, Donelson, et al.
450 Laurel St., 20th Floor
Baton Rouge, LA 70801

Kirk Lindsay Landry
Keogh, Cox, etc.
P. O. Box 1151
Baton Rouge, LA 70821

Robert Mark Martina
Gallow & Jeffcoat, LLP
P. O. Box 61550
Lafayette, LA 70596

Janice Hebert Barber
Attorney at Law
P. O. Drawer 1909
Sulphur, LA 70664

NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING

May 5, 2010

Docket Number: WCA 09-1537

ANTONIO G. RODRIGUEZ
VERSUS
INTEGRITY CONTRACTING, ET AL.

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, all counsel

of record and all parties not represented by counsel as listed above.

FOR THE COURT

/s/ Charles K. McNeely
Charles K. McNeely
Clerk of Court

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

09-1537 consolidated with 09-1538 and 09-1539

ANTONIO G. RODRIGUEZ

VERSUS

INTEGRITY CONTRACTING, ET AL.

Judgment rendered and mailed to all parties or counsel on **May 5, 2010**. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

****

APPEAL FROM THE
OFFICE OF WORKERS' COMPENSATION – # 4
PARISH OF LAFAYETTE, NO. 04-1827
SHARON MORROW,
WORKERS' COMPENSATION JUDGE

****

MARC T. AMY
JUDGE

****

Court composed of Jimmie C. Peters, Marc T. Amy, and J. David Painter, Judges.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

Gregory E. Bodin
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
450 Laurel Street, 20th Floor
Baton Rouge, LA 70801
(225) 381-7000
COUNSEL FOR DEFENDANT/APPELLANT:
Louisiana Workers' Compensation Corporation

Kirk L. Landry
Keogh, Cox & Wilson, Ltd.
Post Office Box 1151
Baton Rouge, LA 70821
(225) 383-3796
COUNSEL FOR DEFENDANT/APPELLANT:
Vaughan Roofing & Sheet Metal, Inc.

Robert M. Martina
Galloway & Jeffcoat, LLP
Post Office Box 61550
Lafayette, LA 70596
(337) 984-8020
COUNSEL FOR DEFENDANT/APPELLEE:
Integrity Contracting

Janice H. Barber
Post Office Drawer 1909
Sulphur, LA 70664-1909
(337) 625-4443
COUNSEL FOR PLAINTIFF/APPELLEE:
Antonio G. Rodriguez

AMY, Judge.

The claimant sought compensation benefits from his direct employer, its insurer, and an alleged statutory employer. The statutory employer demanded

indemnification from the defendant insurer, based on contractual and statutory claims. The workers' compensation judge ultimately found the statutory employer, the direct employer, and the insurer were liable, in solido, for benefits, penalties, and attorney fees. It ordered indemnification by the insurer only on statutory grounds as it concluded that it lacked subject matter jurisdiction to consider the contractual indemnity claim. Both the statutory employer and the defendant insurer appeal. For the following reasons, we affirm the workers' compensation judge's ruling and award additional attorney fees for work performed on appeal.

Factual and Procedural Background

Antonio Garcia Rodriguez (also identified in the pleadings and the record as Antonio Garcia) alleged that he sustained injury on February 6, 2004 when he fell from a roof while performing roofing work for Integrity Contracting. He filed this workers' compensation matter, claiming benefits from Integrity and its workers' compensation insurer, Louisiana Workers' Compensation Corporation (LWCC). However, LWCC denied coverage, asserting that Integrity failed to pay its premium in December 2003, and, thus, LWCC cancelled the policy.

The claimant further named Vaughan Roofing & Sheet Metal, LLC as a defendant, alleging that the company was liable as a statutory employer. He pointed out that Vaughan had a contract with the

University of Louisiana at Lafayette for repair work and that Integrity was performing as a subcontractor. Vaughan denied the relationship and asserted that, in any event, the claimant was precluded from receiving compensation benefits since he was an undocumented worker at the time of the accident, having remained in this country after the expiration of a work visa. Vaughan filed a third party demand against Integrity, as well as LWCC, seeking indemnification and defense costs.

Although separate suits were filed below, the matters were consolidated.[1] After a hearing, the workers' compensation judge entered a ruling in favor of the claimant and against Vaughan and LWCC. The ruling included an order of indemnity benefits, medical benefits, vocational rehabilitation as needed, and penalties and attorney fees. The workers' compensation judge further determined that the LWCC policy provided coverage to Integrity for the subject accident and that LWCC owed Integrity reimbursement for costs of its defense in the matter.

Thereafter, the workers' compensation judge granted Vaughan's and LWCC's motions for new trial, in part, and issued an amended judgment which: recognized Integrity as the claimant's employer and,

---

[1] For disposition of the companion matters, *see Antonio Garcia v. State of Louisiana*, 09-1538 (La.App. 3 Cir. __/__/10), __ So.3d __; *Jason W Stanton v. Louisiana Workers' Compensation Corporation*, 09-1539 (La.App. 3 Cir. __/__/10), __ So.3d __.

thus, a responsible party liable *in solido* with Vaughan and LWCC; recognized the average weekly wage as $487.08 with a compensation rate of $324.75 per week; and granted Vaughan's indemnification claim against Integrity and LWCC pursuant to La.R.S. 23:1063. Further, the workers' compensation judge determined that it lacked subject matter jurisdiction in assessing the contractual claim that resulted in the award of defense costs to Integrity. It, therefore, denied that claim.[2]

---

[2] The recast judgment reads:

> **IT IS ORDERED AND DECREED** that there be judgment in favor of Antonio Garcia Rodriguez against Jason Stanton d/b/a Integrity Contracting, Louisiana Workers' Compensation Corporation, and Vaughan Roofing & Sheet Metal, L.L.C., *in solido*, for indemnity benefits at the rate of $324.75 per week from February 6, 2004 until further order of this Court, subject to a credit for $3250 paid by Jason Stanton; all medical expenses related to the work accident, subject to the Fee Schedule; vocational rehabilitation as appropriate, except that job availability under La.R.S. 23:1226 and 23:1221(3) shall consider jobs that are appropriate and suitable for Antonio Garcia Rodriguez and would be available **but for** his illegal status; penalties of $4,000; attorney's fees of $18,000; interest as provided by law; and all costs of this case.
>
> **IT IS FURTHER ORDERED AND DECREED** that there be judgment herein in favor of Vaughan Roofing & Sheet Metal L.L.C. against Jason Stanton d/b/a Integrity Contracting and Louisiana Workers' Compensation Corporation, *in solido*, pursuant to La.R.S. 23:1063 for indemnification of compensation

(Continued on following page)

Vaughan and LWCC appeal the reformed judgment. Vaughan assigns the following as error:

1. The workers' compensation judge committed legal error in finding that a statutory employer (as opposed to a direct employer) can be liable for state workers' compensation benefits to an illegal alien. The legal error consisted of: a) improperly applying Louisiana jurisprudence applicable to direct employers to a statutory employer; b) failing to note that the issue is res nova in Louisiana; c) failing to apply directly applicable federal law and U.S. Supreme Court jurisprudence, thereby committing legal error involving the constitutional precepts of preemption,

---

payments it may be required to pay as the statutory employer in this case, but denying Vaughan Roofing & Sheet Metal L.L.C.'s claims for its defense costs under § 1063 and § 1201(F) and reserving the rights of Vaughan Roofing & Sheet Metal L.L.C. to bring its contractual indemnity and defense costs claims in a court of proper jurisdiction.

IT IS FURTHER ORDERED AND DECREED that the claims of Jason Stanton d/b/a Integrity Contracting against Louisiana Workers' Compensation Corporation for defense costs arising out of the contractual claim arising under the policy issued by Louisiana Workers' Compensation Corporation are hereby dismissed for lack of subject matter jurisdiction, reserving the rights of Jason Stanton d/b/a Integrity Contracting to bring those claims in a court of proper jurisdiction.

substantive due process and equal protection.

2. The workers' compensation judge committed legal and manifest error in awarding penalties and attorney's fees against Vaughan Roofing & Sheet Metal, LLC as an alleged statutory employer. She committed legal error by failing to distinguish the defenses presented by the direct employer (and its insurer) from those of Vaughan, and thereby failing to consider the separate and independent defenses submitted by Vaughan as more particularly set forth in the preceding assignment of error.

3. The workers' compensation judge committed legal error in awarding any indemnity or wage replacement benefits to the illegal alien claimant. She committed legal error first in failing to state what category or type of benefits were being awarded, instead simply awarding a numerical value. But, based upon other factual findings, it is presumed that the only type of benefits that could have been awarded would have been supplemental earnings benefits. However, the workers' compensation judge committed further legal error by improperly shifting the burden of proof to defendants to disprove claimant's entitlement, when the illegal alien claimant did not and could not meet his initial burden.

4. The workers' compensation judge committed manifest error by improperly calculating the claimant's average weekly wage.

5. The workers' compensation judge committed legal error in failing, on jurisdictional grounds and by misapplying applicable statutes, to award defense costs in favor of Vaughan as statutory employer against Stanton/Integrity and LWCC, and in failing to award contractual indemnification in favor of Vaughan and against Stanton/integrity.

LWCC also appeals, asserting that:

1. The OWC erred as a matter of law in finding that LWCC terminated Policy No. 100154 invalidly and, therefore, had in force and effect a policy of workers' compensation insurance covering Jason W. Stanton, individually, and doing business as Integrity Contracting on February 6, 2004, the date of the Claimant's alleged accident.

2. The OWC erred as a matter of law in finding LWCC liable *in solido* with Stanton/Integrity to indemnify Vaughan for any future compensation payments it may be required to pay as Claimant's statutory employer, as LWCC had no policy in effect providing coverage for Stanton/Integrity, and as Vaughan has not paid any workers' compensation benefits to

Claimant, its right to indemnification does not yet exist.

3. The OWC erred as a matter of law in finding that LWCC did not reasonably controvert this claim and awarding penalties and attorney's fees against LWCC when LWCC[ ] denied this claim in good faith and based on the only applicable law as stated by this Court in *Caesar v. New England Ins. Co.*[, 92-463 (La.App. 3 Cir. 4/7/93), 616 So.2d 850.]

4. The OWC erred as a matter of law in finding that Claimant's illegal alien status has no effect on his eligibility to receive benefits under the Workers' Compensation Act or on the liability and ability of LWCC to provide such benefits and, thus awarding claimant medical and wage benefits and vocational rehabilitation.

5. The OWC erred as a matter of law in finding that the Claimant met his burden of proving the existence and amount of wages, when Claimant submitted no evidence that he was paid a wage; in incorrectly holding that evidence of payments to another was evidence of the amount of Claimant's alleged wages for the purposes of calculating Claimant's average weekly wage and in failing to award the statutory minimum in the absence of evidence of Claimant's actual wages.

The claimant answers the appeal and seeks additional attorney fees for work performed on appeal.

Discussion

Statutory Employer Liability

It is undisputed that the claimant was an undocumented worker at the time of the accident. Vaughan asserts that this affected his ability to receive workers' compensation benefits in numerous ways. In short, it contends that such benefits violate United States Supreme Court jurisprudence and federal law. It also contends that the award violates its own right to due process and equal protection.

A panel of this court considered the question of whether a direct employer owed an undocumented worker compensation benefits in *Artiga v. M.A. Patout and Son,* 95-1412 (La.App. 3 Cir. 4/3/96), 671 So.2d 1138. In *Artiga,* this court recognized that there is no express statutory provision excluding undocumented workers from workers' compensation coverage. Instead, La.R.S. 23:1035(A) indicates that workers' compensation benefits are applicable to "every person performing services arising out of and incidental to his employment in the course of his own trade, business, or occupation, or in the course of his employer's trade, business, or occupation. . . ." While certain statutory exclusions exist, there is no

exclusion for a worker who is in this country illegally. *See, e.g.*, La.R.S. 23:1035(B)[3]; La.R.S. 23:1035.2[4];

---

[3] Louisiana Revised Statutes 23:1035(B) provides:

> B. (1) There is exempt from coverage under this Chapter all labor, work, or services performed by any employee of a private residential householder in connection with the private residential premises of such householder or any employee of a private unincorporated farm, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural commodity, including the management of livestock, when the employee's annual net earnings for labor, work, or services amounts to one thousand dollars or less and the total net earnings of all employees of such farm do not exceed two thousand five hundred dollars and which labor, work, or services are not incidental to and do not arise out of any trade, business, or occupation of such householder or private unincorporated farm. With respect to such labor, work, or services and any employee performing the same, a private residential householder or a private unincorporated farmer, shall have no liability under the provisions of this Chapter either as employer or as a principal; however, any person who is engaged in the trade, business, or occupation of furnishing labor, work, or services to private residential premises or farms, shall be liable under the provisions of this Chapter to his employees or their dependents for injury or death arising from and incidental to their employment in rendering such labor, work, or services.
>
> (2) There is also exempt from coverage under this Chapter, musicians and performers who are rendering services pursuant to a performance contract.

[4] Louisiana Revised Statutes 23:1035.2 provides that: "No compensation shall be payable in respect to the disability or

(Continued on following page)

La.R.S. 23:1037[5]; and La.R.S. 23:1045[6]. The workers'

---

death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act."

[5] Louisiana Revised Statutes 23:1037 provides:

> This Chapter shall not apply to any employer acting as a common carrier while engaged in interstate or foreign commerce by railroad, where the employee of such common carrier was injured or killed while so employed; but if the injury or death of an employee of a railroad occurs while the employer and employee are both engaged and employed at the time in an intrastate operation or movement not controlled or governed by the laws, rule of liability, or method of compensation which has been or may be established by the Congress of the United States, then this Chapter shall govern and compensation shall be recovered hereunder; but nothing in this Chapter shall be construed to apply to any work done on, nor shall any compensation be payable to the master, officers or members of the crew of, any vessel used in interstate or foreign commerce not registered or enrolled in the State of Louisiana.

[6] Louisiana Revised Statutes 23:1045 provides that:

> A. (1) This Chapter shall not apply to, and there is specific exclusion from the operation thereof for, all members of the crew of any airplane engaged in dusting or spraying operations insofar as such members of an airplane crew might be regarded as independent contractors, subcontractors, or employees of any person, firm, or corporation engaged in the principal business of agriculture or farming operations.
>
> (2) All rights of employers and employees in tort are reserved to the parties.

(Continued on following page)

compensation judge referenced *Artiga* in setting forth written reasons for ruling.[7]

B. (1) The provisions of Subsection A of this Section shall not exempt or in any way apply to independent contractors, subcontractors, or employees of any person, firm, partnership, or corporation engaged in the business of applying any products by use of aircraft, either fixed wing or rotor craft, in connection with commercial agricultural, aquacultural, horticultural, silvicultural, floricultural, or agronomic operations or vegetation suppression.

(2) The provisions of this Subsection shall apply to all independent contractors, subcontractors, and employees of such businesses irrespective of whether such person would be considered a member of the crew of such aircraft.

[7] This portion of the workers' compensation judge's reasons indicate, in part, as follows:

Since the Artiga case, the legislature has not amended the pertinent provisions, and therefore the same result applies.

The WCJ finds that Vaughan is the statutory employer of Mr. Garcia pursuant to La.R.S. 23:1061. Vaughan contracted with Integrity, Garcia's direct employer, to provide labor for its contract with the State. Vaughan's main argument is that it should not be held responsible for Integrity's failure to ensure that its laborers were legal. Vaughan distinguishes itself from the *Artiga* case as an innocent party that took an interest in hiring only legal workers and required same in its contract, yet now is being asked to be responsible for an injured worker it would not have hired, and who cannot be vocationally rehabilitated due to his illegal status. This argument fails to take into account that the employer in *Artiga* was misled as to Artiga's status. Artiga presented the employer

(Continued on following page)

with a "resident alien card" and signed an employment eligibility verification. The employer was only notified 4 months after the accident of Artiga's illegal status. The case did not discuss at all any significance attaching to an "innocent" versus "knowing" or "negligent" hire by an employer. The legal premise of the decision is that the Act does not exclude illegal aliens from coverage, and therefore:

> " . . . It is clear that the entitlement of benefits under the Louisiana Workers' Compensation Act is dependent upon the employee status of the claimant. Once it is shown that a claimant has the employee status, the employe[r] is burdened with showing the application of some specific exclusion under which benefits may be denied." 671 So.2d at 1139

Mr. Garcia is the statutory employee of Vaughan, and therefore Vaughan is burdened with showing the application of some specific exclusion under which benefits may be denied. Vaughan has argued the preemption of Louisiana workers' compensation benefits by the United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) which held that the National Labor Relations Board could not award back pay to an undocumented alien. However, Vaughan acknowledges in footnote number 19 of its Pretrial Memorandum and footnote number 9 of its Post Trial Memorandum that while some states have directly responded to the decision in *Hoffman* by amending its compensation laws, Louisiana has not. The Louisiana legislature has failed to respond to both the *Artiga* decision and the Supreme Court in *Hoffman*. The myriad difficulties posed by illegal immigrants in the work force need to be addressed by the legislature if a result different from *Artiga* is sought, but under the current interpretation of the Louisiana Workers' Compensation Act,

(Continued on following page)

On review, we find that Vaughan has failed to demonstrate why the straightforward reasoning applicable in *Artiga,* 671 So.2d 1138, is inapplicable to it as a statutory employer. A statutory employer's liability for the employee of a direct employer, such as Integrity, is dictated by La.R.S. 23:1061.[8]

Vaughan is liable to Garcia as the statutory employer under La.R.S. 23:1061(A)(2).

[8] Louisiana Revised Statutes 23:1061, provides for the liability of statutory employers, i.e. principal contractors, as follows:

> A. (1) Subject to the provisions of Paragraphs (2) and (3) of this Subsection, when any "principal" as defined in R.S. 23:1032(A)(2), undertakes to execute any work, which is a part of his trade, business, or occupation and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal, as a statutory employer, shall be granted the exclusive remedy protections of R.S. 23:1032 and shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed. For purposes of this Section, work shall be considered part of the principal's trade, business, or occupation if it is an integral part of or essential to

(Continued on following page)

Vaughan contends that it cannot be held liable for Integrity's employment of the claimant since it "neither knew of the claimant's illegal status nor did it have a duty under federal or state law to inquire into claimant's status." It asserts that it had a right to rely on Integrity's obligation to ensure that its

---

the ability of the principal to generate that individual principal's goods, products, or services.

(2) A statutory employer relationship shall exist whenever the services or work provided by the immediate employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer.

(3) Except in those instances covered by Paragraph (2) of this Subsection, a statutory employer relationship shall not exist between the principal and the contractor's employees, whether they are direct employees or statutory employees, unless there is a written contract between the principal and a contractor which is the employee's immediate employer or his statutory employer, which recognizes the principal as a statutory employer. When the contract recognizes a statutory employer relationship, there shall be a rebuttable presumption of a statutory employer relationship between the principal and the contractor's employees, whether direct or statutory employees. This presumption may be overcome only by showing that the work is not an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.

B. When the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

work force was legally working in this county. It argues that it is, therefore, deprived of due process of law under both the United States and Louisiana Constitutions. It states that "the making of contracts is a matter of private concern" and the state has not regulated in this area, "the inclusion of illegal aliens within the compensation scheme renders the agreed to provisions in the contract moot, which would in turn require Vaughan to illegally fund benefits to an illegal alien." It contends that it obviously had a property interest in the amounts paid in compensation.

To the extent that Vaughan asserts that operation of the workers' compensation statutes is unconstitutional as applied to its situation, we do not consider those claims on review as the claim has not been presented in proper form in proceedings below. However, central to Vaughan's overall contention in this area is an apparent argument that its contract with Integrity ensured its lack of liability under the workers' compensation scheme. Yet, La.R.S. 23:1033 provides that "[n]o contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this Chapter except as herein provided." Again, there is no provision in the workers' compensation statutes that excludes coverage for undocumented workers for either direct or statutory employers. We find no error in the workers' compensation judge's recognition that the legislature has not amended the statutory

provisions in this regard since the decision in *Artiga*, 671 So.2d 1138.

Neither is there merit in Vaughan's assertion that the workers' compensation judge's ruling runs afoul of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275 (2002). According to Vaughan, *Hoffman* indicates that federal law preempts an award of state workers' compensation benefits to an undocumented worker. However, a reading of *Hoffman* does not support this argument. Instead, *Hoffman* addressed whether an undocumented worker was entitled to back pay following a termination of employment after an employer found him or her to be unauthorized to work. The Supreme Court determined that the worker was not entitled to such pay as it was contrary to federal immigration policy. In particular, such a payment was contrary to the Immigration Reform and Control Act of 1986. While *Hoffman* contains a wealth of information regarding immigration policy, its reach does not include language indicating that a matter of state workers' compensation coverage, such as this, is preempted by this policy. The workers' compensation judge noted an absence of legislation in this state on this topic, stating:

> Vaughan has argued the preemption of Louisiana workers' compensation benefits by the United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) which held that the National Labor Relations Board could not award back

> pay to an undocumented alien. However, Vaughan acknowledges in footnote number 19 of its Pretrial Memorandum and footnote number 9 of its Post Trial Memorandum that while some states have directly responded to the decision in *Hoffman* by amending its compensation laws, Louisiana has not. The Louisiana legislature has failed to respond to both the *Artiga* decision and the Supreme Court in *Hoffman*. The myriad difficulties posed by illegal immigrants in the work force need to be addressed by the legislature if a result different from *Artiga* is sought, but under the current interpretation of the Louisiana Workers' Compensation Act, Vaughan is liable to Garcia as the statutory employer under La.R.S. 23:1061(A)(2).

We find no error in the workers' compensation judge's statement of the law on this subject.

Neither do we find merit in Vaughan's contention that, due to the circumstances of the claimant's status, numerous definitions and provisions of the Workers' Compensation Act are inapplicable to the claimant, thus revealing a positive statement of inapplicability to an undocumented worker.[9] Again,

---

[9] For instance, Vaughan notes that the award of any benefits requires a calculation of an average weekly wage, which, it suggests, is impossible as wages received by an undocumented worker would be illegal and "[i]t is patently unreasonable to include wages illegally obtained in the calculation of an employee's capacity to earn money." Similarly, Vaughan contends that, for calculation of SEBs, there could be "no legal wage to compare

(Continued on following page)

we find no positive expression in the workers' compensation provision excluding its application in this case. Instead, La.R.S. 23:1035(A) reveals broad applicability.

Penalties and Attorney Fees

Vaughan contends that the workers' compensation judge erred in finding that it failed to reasonably controvert the payment of benefits in light of its arguments regarding the inapplicability of the Workers' Compensation Act to an undocumented worker. It contends that its actions in denying benefits should have been considered separately from those of the direct employer.

Louisiana Revised Statutes 23:1201 provides that:

> F. Failure to provide payment in accordance with this Section or failure to consent to

---

before and after an accident" and that vocational rehabilitation could not be used to return a worker to the workplace when he could not be legally employed. Vaughan also references La.R.S. 23:1121's requirement that claimants may be required to periodically submit to medical examinations and argues that it would be inapplicable as the undocumented worker would be "subject to deportation and, thus, may not be available for periodic medical examinations." Finally, Vaughan points to La.R.S. 23:1361 which prohibits an employee from being discharged due to the filing of a compensation claim and asserts that the "remedy is obviously not available to an illegal alien whose very employment and subsequent wages are in violation of federal and state law."

> the employee's request to select a treating physician or change physicians when such consent is required by R.S. 23:1121 shall result in the assessment of a penalty in an amount up to the greater of twelve percent of any unpaid compensation or medical benefits, or fifty dollars per calendar day for each day in which any and all compensation or medical benefits remain unpaid or such consent is withheld, together with reasonable attorney fees for each disputed claim; however, the fifty dollars per calendar day penalty shall not exceed a maximum of two thousand dollars in the aggregate for any claim. The maximum amount of penalties which may be imposed at a hearing on the merits regardless of the number of penalties which might be imposed under this Section is eight thousand dollars. . . .
>
> . . . .
>
> (2) This Subsection shall not apply if the claim is reasonably controverted or if such nonpayment results from conditions over which the employer or insurer had no control.

It is clear that the claimant was injured while performing work for Integrity, Vaughan's subcontractor. And, in fact, on appeal, Vaughan does not contest the factual determination as to its status as a statutory employer. Further, it chose to deny benefits in the face of *Artiga* and in the absence of positive

legislation excluding a claimant such as Mr. Rodriguez from receiving compensation benefits.

This assignment lacks merit.

Burden of Proof

The workers' compensation judge awarded indemnity benefits without specifically defining those benefits as temporary total disability benefits or supplemental earnings benefits. Vaughan asserts that, because the ruling included language regarding the availability of vocational rehabilitation benefits, it indicated that the benefits awarded were SEBs. In turn, it contends that the workers' compensation judge impermissibly applied the burden of proof for an award of SEBs.

In pertinent part, the ruling under review included that:

> **IT IS ORDERED AND DECREED** that there be judgment in favor of Antonio Garcia Rodriguez against Jason Stanton d/b/a Integrity Contracting, Louisiana Workers' Compensation Corporation, and Vaughan Roofing & Sheet Metal L.L.C., *in solido,* for indemnity benefits at the rate of $324.75 per week from February 6, 2004 until further order of this Court, subject to a credit for $3250 paid by Jason Stanton; all medical expenses related to the work accident, subject to the Fee Schedule; *vocational rehabilitation as appropriate, except that job availability under La.R.S. 23:1226 and 23:1221(3) shall*

> *consider jobs that are appropriate and suitable for Antonio Garcia Rodriguez and would be available* ***but for*** *his illegal status[.]*

(Italics added; bold in the original).

While the above ruling was, perhaps, premature with regard to the ultimate availability of vocational rehabilitation, we reject Vaughan's assertion that this language indicates that the workers' compensation judge awarded SEBs rather than TTD. The record indicates that only TTD benefits were at issue given the claimant's debilitating injuries[10] and continued difficulties at the time of trial. The inclusion of the vocational rehabilitation language would seemingly be in response to Vaughan's assertion that the Workers' Compensation Act cannot be applied to this case since vocational rehabilitation attempts to return a worker to the workplace. The workers' compensation judge's ruling must be viewed in this light

---

[10] The parties stipulated that, as a result of the claimant's fall, he "suffered a burst fracture of L-1, resulting in bowel and bladder incontinence." The claimant testified that, following the accident, he was in the hospital for twenty-two days, his problems have not changed since his release, he is catheterized every six hours, and that he is constantly constipated. The claimant explained his most severe pain stems from his rectum and back. He denied that any physician had released him to return to work. The claimant's pain management physician testified via deposition that the claimant suffers from Cauda Equina Syndrome, a diagnosis reached by other physicians treating the claimant as well. This physician opined that the claimant will not be able to work now or in the future "because of severe pain and bowel and bladder dysfunction."

and not, as construed by Vaughan, as an indication that SEBs were awarded. Neither was vocational rehabilitation immediately ordered. Instead, the workers' compensation judge merely recognized its availability "as appropriate[.]"

This assignment lacks merit.

Average Weekly Wage Calculation

The workers' compensation judge determined the claimant's average weekly wage to be $487.08. Vaughan contends this determination was manifestly erroneous. It argues that the claimant failed to adequately prove his wages insofar as he was paid on a cash basis.

In light of the circumstances of this case, we find no manifest error in the shaping of the AWW.[11]

---

[11] The workers' compensation judge explained:

> The WCJ finds that Garcia's average weekly wage is $487.08. As noted in the plaintiff's Post Trial Rebuttal Brief, LWCC's audit of Jason Stanton reflected that Stanton paid Jose Celedon $52,605.00 for the 18 week period between August 30, 2003 and December 25, 2003. The testimony was consistent that Garcia was working on Celedon's crew at the time of the accident, that Stanton paid Jose Celedon by check and Celedon paid the rest of the crew. The men were paid per square foot. Miguel Bostos testified the men each received between $400 and $500 per week. Mr. Garcia testified he was paid between $350 and $500 per week. The testimony was that the crew varied from 5 to 6 persons, and they worked 3 to 5 days per week,

(Continued on following page)

Testimony indicated that the claimant worked on a crew put together by Jose Celedon while employed by Integrity. According to Jason Stanton, an owner of Integrity, Integrity paid Mr. Celedon for the entirety of his crew and did so based upon the amount of work they completed. Thereafter, Mr. Celedon paid the men on his crew. Mr. Stanton explained that he did not consider the men on Mr. Celedon's crew to be his employees.[12] Thus, the claimant was unable to rely upon pay stubs or other documentation from Integrity to establish his pay rate.

However, the claimant testified that he typically made between $350 to $500 per week. Another member of the crew, Miguel Bostos, offered a similar wage range, stating that his pay was typically $405 per week, but that the figure would "go up and down[.]" Mr. Bostos stated that the members of the crew were paid equally. Furthermore, and as noted by the workers' compensation judge in her reasons for ruling, the record includes an audit of Integrity's accounting records for the period of May 13, 2003 through December 25, 2003. The workers' compensation judge used the figure contained in this audit, and

---

> depending on the weather and other variables. Given that the audit of Stanton's records provides the best documentary evidence of what Celedon's crew was paid, and given that the amount is within the range estimated by the witnesses at trial, the sum of $487.08 per week is reasonably supported. . . .

[12] Integrity did not appeal the workers' compensation judge's determinations as to its liability.

purportedly paid to Mr. Celedon, as corroboration for the figures advanced by the claimant.

In light of the circumstances of this case, we find no manifest error in the AWW set forth by the workers' compensation judge. Admittedly, the reasons for ruling indicate that the judge's arrival at the figure relied upon sources not typically necessary in a workers' compensation case. However, that does not signal an error in the workers' compensation judge's ruling. Rather, it is a consequence of the irregular employment system utilized in this case. To find merit in Vaughan's argument, would allow it to impermissibly rely on its subcontractor's informal payment system as a defense to circumvent the workers' compensation laws regarding payment of a wage. While this payment may have challenged the workers' compensation judge in precisely shaping the award, we find no manifest error in the figure she ultimately found appropriate.

Subject Matter Jurisdiction

As explained above, Vaughan filed a third party demand against both Integrity and LWCC for indemnification and court costs. At the time the workers' compensation judge considered the motions for new trial, she determined that the Office of Workers' Compensation lacked subject matter jurisdiction over the indemnification claim that arose pursuant to the Vaughan/Integrity contract.

On appeal, Vaughan questions this determination, arguing that La.R.S. 23:1310.3(E) provides a basis for jurisdiction on this claim. This paragraph provides:

> Except as otherwise provided by R.S. 23:1101(B), 1361, and 1378(E), the workers' compensation judge shall be vested with original, exclusive jurisdiction *over all claims or disputes arising out of this Chapter,* including but not limited to workers' compensation insurance coverage disputes, group self-insurance indemnity contract disputes, employer demands for recovery for overpayment of benefits, the determination and recognition of employer credits as provided for in this Chapter, and cross-claims between employers or workers' compensation insurers or self-insurance group funds for indemnification or contribution, concursus proceedings pursuant to Louisiana Code of Civil Procedure Articles 4651 et seq. concerning entitlement to workers' compensation benefits, payment for medical treatment, or attorney fees arising out of an injury subject to this Chapter.

La.R.S. 23:1310.3. (Emphasis added.) In particular, Vaughan asserts that its claim is included within La.R.S. 23:1310.3 as it related to a "cross-claim[ ] between employers or workers' compensation insurers or self-insurance group funds for indemnification or contribution[.]"

We conclude that the workers' compensation judge correctly determined the subject matter jurisdiction issue. Here, Vaughan's indemnification and defense claims arose from its contract with Integrity and, in turn, Integrity's contract with LWCC. As in *Broussard Physical Therapy v. Family Dollar Stores, Inc.*, 08-1013 (La. 12/2/08), 5 So.3d 812, no party in this case could dispute whether the main claim arose under the workers' compensation statutory provisions. However, the indemnification claim over which the workers' compensation judge found no subject matter jurisdiction did not. Instead, these indemnification claims stemmed solely from its contract with Integrity. Accordingly, they did not arise under the Act. *See, e.g., id.* In this regard, however, the workers' compensation judge retained jurisdiction over those indemnification claims arising under the Act insofar as she granted Vaughan's indemnification under La.R.S. 23:1063.[13]

---

[13] Louisiana Revised Statutes 23:1063 provides:

> A. A principal contractor, when sued by an employee of a subcontractor or his dependent, may call that contractor, or any intermediate contractor or contractors, as a co-defendant, and the principal contractor shall be entitled to indemnity from his subcontractor for compensation payments paid by the principal contractor on account of an accidental injury to the employee of the subcontractor.
>
> B. A principal contractor, when sued pursuant to the provisions of R.S. 23:1021(6) by an independent contractor who is a sole proprietor and who has elected by written agreement not to be covered by the

(Continued on following page)

Having found no Merit in Vaughan's appeal, we turn to consideration of LWCC's assignments of error.

Termination of LWCC Policy

LWCC first questions the workers' compensation judge's determination that a valid policy was in effect at the time of the February 2004 accident due to LWCC's failure to demonstrate that it validly cancelled that policy.

Previously entitled La.R.S. 22:636.4, La.R.S. 22:1267 presently provides, in pertinent part:

> C. (1) If coverage has not been in effect for sixty days and the policy is not a renewal, cancellation shall be effected by mailing or delivering a written notice to the first-named insured at the mailing address shown on the policy at least sixty days before the cancellation effective date, except in cases where cancellation is based on nonpayment of premium. *Notice of cancellation based on nonpayment of premium shall be mailed or delivered at least ten days prior to the effective date of cancellation.* After coverage has been in effect for more than sixty days or

---

provisions of this Chapter in accordance with R.S. 23:1035 or his dependent, may call such independent contractor as a co-defendant, and the principal contractor shall be entitled to indemnity from his independent contractor for compensation payments paid by the principal contractor on account of an accidental injury to the independent contractor.

> after the effective date of a renewal policy, no insurer shall cancel a policy unless the cancellation is based on at least one of the following reasons:
>
> (a) Nonpayment of premium.
>
> . . . .
>
> (2)(a) A notice of cancellation of insurance coverage by an insurer shall be in writing and shall be mailed or delivered to the first-named insured at the mailing address as shown on the policy. Notices of cancellation based on R.S. 22:1267(C)(1)(b) through (g) shall be mailed or delivered at least thirty days prior to the effective date of the cancellation; notices of cancellations based upon R.S. 22:1267(C)(1)(a) shall be mailed and delivered at least thirty days prior to the effective date of the cancellation; *notices of cancellations based upon R.S. 22:1267(C)(1)(a) shall be mailed or delivered at least ten days prior to the effective date of cancellations. The notice shall state the effective date of the cancellation.*

(Emphasis added.)

With regard to the coverage issue, the workers' compensation judge explained:

> I am going to find that there was an invalid termination of coverage, and I am going to base that on Revised Statute 22:636[.]4 which requires that notice of termination be mailed or delivered ten days prior to the

termination. That wasn't done in this case. Ms. Lamb did cite the case of *Perkins versus Baptiste,* 469 Southern Second 27 for the proposition that the coverage period could extend for the ten-day period. I simply note that that case was decided before at least the current exception of the statute. To my knowledge, there has been no similar interpretation since that time and the parties have cited none. My own research didn't reveal much either.

And I'd like to note that particularly under the facts and circumstances of this case, the termination was confusing as pointed out in Ms. Barber's post-trial memorandum. There is some question as to whether LWCC could actually have reinstated the policy as it had done previously. Also, contributing to the confusion is the fact that premium notices continued to be sent to Mr. Stanton after the purported termination, those invoices being for continued coverage. Certainly, it contributed to the ultimate confusion that we saw at the trial of the matter.

I was interested in Mr. Landry's argument in his brief attempting to demonstrate that, in fact, the policy was paid up. But I have to confess my mind does not wrap easily around numbers; and given our short time frame here, I didn't get to completely determine whether I agreed with him or not. Certainly, I wanted to, but I cannot make that part of my finding today.

> I will say that I don't think that the estoppel applies. I probably don't need to get there, and this should be considered just my additional thoughts on the matter. Quality was not the contractual agent at the time that all of this went forward, the contractual agent for LWCC, and the estoppel arguments don't nicely tie in with what the actual agency agreements were at the time. So my ruling is solely based on the statute.

This case is resolved with reference to the exhibits and the statute. LWCC contends that it "issued" a notice of cancellation on December 15, 2003 due to Integrity's failure to pay its premium in full. The notice, which was introduced into evidence, includes a date of December 15th and a scheduled expiration date of December 25, 2003.

However, and although the notice is dated December 15th, LWCC's exhibits support the workers' compensation judge's view that the notice was not mailed until the following day, December 16th. The workers' compensation judge was not manifestly erroneous in taking this date into account in determining that this nine-day period of notice was insufficient under La.R.S. 22:1267(C)(1) insofar as the statute requires that the notice "*be mailed or delivered at least ten days prior to the effective date of cancellation.*"

Although LWCC contends that jurisprudence indicating that, although untimely, the notice of cancellation could be reformed as it provided the insured

with actual notice, we reject LWCC's reliance on these cases. *See, e.g., Caesar v. New England, Ins., Co.*, 616 So.2d 850 (La.App. 3 Cir. 1993); *Perkins v. Battiste*, 469. So.2d 27 (La.App. 1 Cir. 1985). Instead, the circumstances surrounding this cancellation are unclear at best. Mr. Stanton denied that Integrity received the December 2003 notice of cancellation. Furthermore, and despite the purported cancellation, LWCC sent invoices for the policy into 2004 and also received payments from Integrity in this regard. It did so despite testimony from its representative that, once the policy cancelled on December 25th, it could not be reinstated. In short, and in addition to the explicit wording of La.R.S. 23:1267(C)(1), the record supports the workers' compensation judge's determination that LWCC failed to prove the effective termination of the pertinent workers' compensation policy.

Solidary Liability

In light of the finding on the preceding assignment, LWCC's contention that it could not be solidarily liable with Vaughan absent a valid contract is rendered moot.

Penalties and Attorney Fees

LWCC alternatively argues that the workers' compensation judge cued in casting it with penalties and attorney fees. It contends that its denial of the claim was reasonably controverted based on its good

faith belief that it effectively cancelled Integrity's policy.

We find no manifest error in the workers' compensation judge's determination that penalties and attorney fees were appropriate in this case. The wording of La.R.S. 22:1267 is explicit regarding the time periods associated with notices of cancellation. Furthermore, the confusion surrounding the paperwork, correspondence, and payments associated with the policy were within LWCC's control. This assignment lacks merit.

Benefits, Calculation of AWW, and Vocational Rehabilitation

Finally, LWCC adopts the arguments of Vaughan and makes similar arguments regarding the claimant's right to indemnity benefits, the calculation of the AWW, and the availability of vocational rehabilitation. For the reasons set forth above in discussion of Vaughan's claim, these arguments lack merit.

Answer

The claimant has answered the appeal, seeking additional attorney fees for work performed in defense of this appeal. In this regard, we award an additional $5,000 in attorney fees for appellate work necessitated by successfully defending the separate appeals of LWCC and Vaughan.

DECREE

For the foregoing reasons, the workers' compensation judge's ruling on appeal is affirmed. We award the claimant/appellant, Antonio Garcia Rodriguez, an additional $5,000 as attorney fees for work performed on appeal. Costs of this proceeding are assessed equally to the appellants, Vaughan Roofing & Sheet Metal, LLC and Louisiana Workers' Compensation Corporation.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

09-1538 consolidated with 09-1537 and 09-1539

ANTONIO GARCIA

VERSUS

STATE OF LOUISIANA

Judgment rendered and mailed to all parties or counsel on **May 5, 2010**. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

****

APPEAL FROM THE
OFFICE OF WORKERS' COMPENSATION – # 4
PARISH OF LAFAYETTE, NO. 04-04993
SHARON MORROW,
WORKERS' COMPENSATION JUDGE

****

MARC T. AMY
JUDGE

****

Court composed of Jimmie C. Peters, Marc T. Amy, and J. David Painter, Judges.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

Gregory E. Bodin
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
450 Laurel Street, 20th Floor
Baton Rouge, LA 70801
(225) 381-7000
COUNSEL FOR DEFENDANT/APPELLANT:
Louisiana Workers' Compensation
Corporation

Kirk L. Landry
Keogh, Cox & Wilson, Ltd.
Post Office Box 1151
Baton Rouge, LA 70821
(225) 383-3796
COUNSEL FOR DEFENDANT/APPELLANT:
Vaughan Roofing & Sheet Metal, Inc.

Robert M. Martina
Galloway & Jeffcoat, LLP
Post Office Box 61550
Lafayette, LA 70596
(337) 984-8020
COUNSEL FOR DEFENDANT/APPELLEE:
Integrity Contracting

Janice H. Barber
Post Office Drawer 1909
Sulphur, LA 70664-1909
(337) 625-4443
COUNSEL FOR PLAINTIFF/APPELLEE:
Antonio G. Rodriguez

AMY, Judge.

For discussion of this matter, see the opinion of the companion case at *Antonio G. Rodriguez v. Integrity Contracting, et al.*, 09-1537 (La.App. 3 Cir. __/__/10), ___ So.3d ___.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

09-1539 consolidated with 09-1537 and 09-1538

JOHN W. STANTON, ET AL.

VERSUS

LOUISIANA WORKERS' COMPENSATION CORPORATION, ET AL.

Judgment rendered and mailed to all parties or counsel on **May 5, 2010**. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

****

APPEAL FROM THE
OFFICE OF WORKERS' COMPENSATION – # 4
PARISH OF LAFAYETTE, NO. 05-00673
SHARON MORROW,
WORKERS' COMPENSATION JUDGE

****

MARC T. AMY
JUDGE

****

Court composed of Jimmie C. Peters, Marc T. Amy, and J. David Painter, Judges.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

Gregory E. Bodin
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.

450 Laurel Street, 20th Floor
Baton Rouge, LA 70801
(225) 381-7000
COUNSEL FOR DEFENDANT/APPELLANT:
Louisiana Workers' Compensation Corporation

Kirk L. Landry
Keogh, Cox & Wilson, Ltd.
Post Office Box 1151
Baton Rouge, LA 70821
(225) 383-3796
COUNSEL FOR DEFENDANT/APPELLANT:
Vaughan Roofing & Sheet Metal, Inc.

Robert M. Martina
Galloway & Jeffcoat, LLP
Post Office Box 61550
Lafayette, LA 70596
(337) 984-8020
COUNSEL FOR DEFENDANT/APPELLEE:
Integrity Contracting

Janice H. Barber
Post Office Drawer 1909
Sulphur, LA 70664-1909
(337) 625-4443
COUNSEL FOR PLAINTIFF/APPELLEE:
Antonio G. Rodriguez

AMY, Judge.

For discussion of this matter, see the opinion of the companion case at *Antonio G. Rodriguez v. Integrity Contracting, et al.*, 09-1537 (La.App. 3 Cir. __/__/10), __ So.3d __.

AFFIRMED. ADDITIONAL ATTORNEY FEES AWARDED FOR WORK PERFORMED ON APPEAL.

ANTONIO GARCIA RODRIGUEZ	**DOCKET NUMBER 04-01827, DIST. 04**
VERSUS	**OFFICE OF WORKERS' COMPENSATION**
VAUGHN ROOFING & SHEET METAL	**STATE OF LOUISIANA**

JUDGMENT

This matter came for trial on issues relating to the February 6, 2004 work accident of Antonio Garcia Rodriguez. Present were the parties through counsel of record: Janice H. Barber for Antonio Garcia Rodriguez, Robert Martina for Jason Stanton and Integrity Contracting, Kirk Landry for Vaughan Roofing & Sheet Metal, LLC, and Gregory Bodin for Louisiana Workers' Compensation Corporation ("LWCC".) Considering the law and the evidence, and for written reasons assigned this date:

IT IS ORDERED AND DECREED that there be judgment in favor of Antonio Garcia Rodriguez against Louisiana Workers' Compensation Corporation and Vaughan Roofing & Sheet Metal L.L.C., *in solido*, for indemnity benefits at the rate of $429 per week from February 6, 2004 until further order of this Court, subject to a credit for $3250 paid by Jason Stanton, all medical expense related to the work accident, subject to The Fee Schedule, vocational rehabilitation as appropriate, except that job availability under La.R.S. 23:1226 and 23:1221(3) shall consider jobs that are appropriate and suitable for Garcia and would be available **but for** his illegal

status, penalties of $4000, attorney fees of $18,000, interest as provided by law, and all costs of this case.

IT IS FURTHER ORDERED AND DECREED that there be judgment herein in favor of integrity. Contracting/Jason Stanton and against LWCC finding that LWCC provides workers' compensation coverage to Jason Stanton/Integrity Contracting for the accident of Antonio Garcia Rodriguez, and for reimbursement of costs of defense of $32,438.74.

JUDGMENT RENDERED, READ AND SIGNED this 27th day of February 2009.

/s/ Sharon M. Morrow
SHARON M. MORROW
WORKERS' COMPENSATION JUDGE
STATE OF LOUISIANA

ANTONIO GARCIA RODRIGUEZ	**DOCKET NUMBER 04-01827, DIST. 04**
VERSUS	**OFFICE OF WORKERS' COMPENSATION**
VAUGHAN ROOFING & SHEET METAL	**STATE OF LOUISIANA**

REASONS FOR JUDGMENT

This matter was tried on multiple issues relating to the work accident of Antonio Garcia Rodriguez (hereinafter referred to as "Antonio Garcia," "Mr. Garcia," or the "employee,") Mr. Garcia fell from a roof while performing work at the University of Louisiana at Lafayette. He sustained multiple injuries, including a burst fracture of his LI vertebrae and continues to have problems with incontinence, requiring a catheter, and pain. Mr. Garcia is a native of Mexico and speaks no English. He worked in the U.S. in 1993 and 1994, returned to Mexico, then came back to the U.S. in approximately June of 2003. He had a work visa, but it had expired as of the time of his February 2004 accident. At the time of the accident, he was employed with Integrity Contracting, a d/b/a of Jason Stanton. While Jason Stanton paid benefits to Mr. Garcia for a time, his insurer, Louisiana Workers' Compensation Corporation (LWCC) denied coverage, and Stanton closed the business and stopped paying benefits to Mr. Garcia.

LWCC's coverage defense was tried separately and prior to trial on the merits, with this Workers' Compensation Judge finding that LWCC had not properly notified Stanton of the cancellation of his

policy. The State of Louisiana was dismissed on Motion for Summary Judgment. Mr. Garcia's claim proceeded to trial against Integrity, LWCC, and Vaughn Roofing & Sheet Metal, ("Vaughn"), the entity that contracted for Integrity's services.

There is no real issue that Mr. Garcia was an employee of Integrity Contracting/Jason Stanton, and was injured in the course and scope of his employment. Further, in accordance with the prior ruling, LWCC is found to provide coverage for Integrity, and therefore is responsible for Mr. Garcia's benefits. The fact that Mr. Garcia was working illegally has no effect on the liability of Integrity or LWCC. In *Artiga v. M.A. Paiout and Son,* 95-1412 (La. App. 3 Cir. 4/3/96); 671 So.2d 1138, the court held that the claimant's illegal alien status had no effect on his eligibility to receive benefits under the Workers' Compensation Act. The court examined La.R.S. 23:1035(A) dealing with persons eligible for benefits, and La.R.S. 23:1035(B), La.R.S. 23:1035.2, La.R.S. 23:1037, and La.R.S, 23:1045, provisions excluding certain employees. None of those provisions required at that time that an employee have legal status in order to be eligible for benefits. Since the *Artiga* case the legislature has not amended the pertinent provisions, and therefore the same result applies.

The WCJ finds that Vaughan is the statutory employer of Mr. Garcia pursuant to La.R.S. 23:1061. Vaughan contracted with Integrity, Garcia's direct employer, to provide labor for its contract with the State. Vaughan's main argument is that it should not

be held responsible for Integrity's failure to ensure that its laborers were legal. Vaughan distinguishes itself from the *Artiga* case as an innocent party that took an interest in hiring only legal workers and required same in its contract, yet now is being asked to be responsible for an injured worker it would not have hired, and who cannot be vocationally rehabilitated due to his illegal status. This argument fails to take into account that the employer in *Artiga* was misled as to Artiga's status. Artiga presented the employer with a "resident alien card" and signed an employment eligibility verification. The employer was only notified 4 months after the accident of Artiga's illegal status. The case did not discuss at all any significance attaching to an "innocent" versus "knowing" or "negligent" hire by an employer. The legal premise of the decision is that the Act does not exclude illegal aliens from coverage, and therefore:

> " . . . It is clear that the entitlement of benefits under the Louisiana Workers' Compensation Act is dependent upon the employee status of the claimant. Once it is shown that a claimant has the employee status, the employer is burdened with showing the application of some specific exclusion under which benefits may be denied." 671 So.2d at 1139

Mr. Garcia is the statutory employee of Vaughan, and therefore Vaughan is burdened with showing the application of some specific exclusion under which benefits may be denied. Vaughan has argued the preemption of Louisiana workers' compensation

benefits by the United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) which held that the National labor Relations Board could not award back pay to an undocumented alien. However, Vaughan, acknowledges in footnote number 19 of its Pretrial Memorandum and footnote number 9 of its Post Trial Memorandum that while some states have directly responded to the decision in *Hoffman* by amending its compensation laws, Louisiana has not. The Louisiana legislature has failed to respond to both the *Artiga* decision and the Supreme Court in *Hoffman*. The myriad difficulties posed by illegal immigrants in the work force need to be addressed by the legislature if a result different from *Artiga* is sought, but under the current interpretation of the Louisiana Worker's Compensation Act, Vaughan is liable to Garcia as the statutory employer under La.R.S. 23:1061(A)(2).

The WCJ finds that Garcia's average weekly wage is $487.08. As noted in the plaintiffs Post Trial Rebuttal Brief, LWCC's audit of Jason Stanton reflected that Stanton paid Jose Celedon $52,605.00 for the 18 week period between August 30, 2003 and December 25, 2003. The testimony was consistent that Garcia was working on Celdon's crew at the time of the accident, that Stanton paid Jose Celedon by check and Celedon paid the rest of the crew. The men were paid per square foot. Miguel Bostos testified the men each received between $400 and $500 per week. Mr. Garcia testified he was paid between $350 and $500 per week. The testimony was that the crew

varied from 5 to 6 persons, and they worked 3 to 5 days per week, depending on the weather and other variables. Given that the audit of Stanton's records provides the best documentary evidence of what Celedon's crew was paid, and given that the amount is within the range estimated by the witnesses at trial, the sum of $487.08 per week is reasonably supported. He is therefore entitled to the maximum rate at the time of his accident of $429.00 per week.

While the WCJ does find that Mr. Garcia's entitlement to benefits is unaffected by his illegal status, based upon *Artiga,* that case did not reach the issue of how illegal status will impact the employer/insurer's obligation of vocational rehabilitation. Obviously an employer/insurer may never be able to comply with La.R.S. 23:1226, nor establish an earning capacity under La.R.S. 23:1221(3) because no job will legally be "available" to an illegal alien. This obstacle to rehabilitation would actually treat the illegal injured worker more favorably than the legal injured worker because the illegal worker would be entitled to at least 10 years of supplemental earnings with no evidence of job "availability," assuming the worker was physically able to perform some type of employment. Therefore, the WCJ finds that Mr. Garcia is entitled to vocational rehabilitation, based upon employment opportunities that would be available to him *but for* his illegal status.

The WCJ finds that this forum has jurisdiction for the claims for indemnity asserted by Stanton against LWCC for reimbursement of attorneys fees,

and by Vaughan against Stanton/LWCC for reimbursement of attorney fees. Stanton's fee reimbursement request of $32,438.74 is granted. Vaughan's request is denied. Vaughan relies upon La.R.S. 23:1201(F) for this request. As noted in briefing, neither La.R.S. 23:1061 nor La.R.S. 23:1063 provide for a defense obligation. Had Vaughan voluntarily paid compensation benefits, this request might have some merit. As it is, Vaughan is no more or less reasonable in its inaction than any other defendant.

While Vaughan is statutorily entitled to indemnification from the direct employer or its insurer for compensation benefits paid, Vaughan has not paid any compensation benefits. Vaughan's right to indemnification is reserved to it.

Mr. Garcia is entitled to penalties and attorney fees. The sum of $4000 in penalties is awarded to him for the failure of both LWCC and Vaughan to pay benefits. Claimant's counsel requests attorney fees commensurate with that requested by the defendants. The WCJ finds the sum of $18,000 to be reasonable under the circumstances. The award will be assessed against LWCC and Vaughan *in solido*.

Thus done this 27th day of February 2009.

/s/ Sharon M. Morrow
SHARON M. MORROW
WORKERS' COMPENSATION
JUDGE
STATE OF LOUISIANA

The Supreme Court of the State of Louisiana

ANTONIO G. RODRIGUEZ NO. 2010-C-1307

VS.

INTEGRITY CONTRACTING
ET AL.

IN RE: Vaughan Roofing & Sheet Metal LLC; – Defendant; Applying For Writ of Certiorari and/or Review Office of Workers' Compensation Dist. 4, Nos. 04-01827, 04-04993; to the Court of Appeal, Third Circuit, Nos. 09-1537, 09-1538;

September 24, 2010

Denied.

BJJ
JTK
JLW
GGG
MRC

VICTORY, J., would grant.

Supreme Court of Louisiana
September 24, 2010

/s/ Jeffrey C. Collins
Chief Deputy Clerk of Court
For the Court

8 U.S.C.A. § 1324a

§ 1324a. Unlawful employment of aliens

Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity –

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

* * *

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be

conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

ANTONIO GARCIA	**DOCKET NO.:**
	04-01827 DIST. 04
	04-04993
VERSUS	**04-05975**
	04-00673
VAUGHAN ROOFING & SHEET METAL, L.L.C., ET AL	**OFFICE OF WORKERS' COMPENSATION**
	STATE OF LOUISIANA

****

PRETRIAL MEMORANDUM OF FACTS AND LAW:

PREEMPTION, LOUISIANA LAW, SUBSTANTIVE DUE PROCESS AND CLAIMANTS' EMPLOYMENT STATUS

MAY IT PLEASE THE COURT:

Vaughan Roofing & Sheet Metal, L.L.C. ("Vaughan") respectfully submits this pretrial memorandum of facts and law to address federal law preemption and similar other issues related to claimants' status as an illegal alien, particularly as they relate to Vaughan as an alleged statutory employer.

INTRODUCTION

A trial on the merits is scheduled for August 10, 2007. A previous trial was held on January 9, 2006 wherein this Honorable Court solely determined that Louisiana Workers' Compensation Corporation ("LWCC") had in force a valid policy of workers' compensation insurance in favor of Jason W. Stanton individually and d/b/a Integrity Contracting ("Integrity")

on February 6, 2004, the date of the accident alleged herein by Antonio Garcia Rodriguez ("Garcia").

* * *

ARGUMENT

I. FEDERAL LAW PREEMPTS AN AWARD OF STATE WORKERS COMPENSATION BENEFITS TO AN ILLEGAL ALIEN.

A. An Award of State Workers Compensation Benefits to an Illegal Alien Is Preempted by Federal Law.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the United States Supreme Court interpreted the Immigration Reform and Control Act of 1984 ("IRCA") and concluded that the National Labor Relations Board (NLRB) *could not award back pay, i.e., lost wages*, to an undocumented alien who had been terminated in violation of the National Labor Relations Act (NLRA) because:

> It would unduly [en]trench (sic) upon explicit statutory prohibitions critical to federal immigration policy . . . encourage the successful evasion of apprehension by immigration authorities . . . condone prior violation of the immigration laws . . . [and] encourage future violations.[15]

---

[15] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

The court left no doubt that prohibiting the employment of illegal aliens is the "critical" policy of IRCA.[16]

The primary function of the Louisiana Workers Compensation Act ("Act") is to serve as a form of social insurance,[17] *to replace lost wages and to compensate for the lost capacity to earn wages.*[18] In effect, benefits under the Act stand in the place of the employee's present earning power, which is alleged to be diminished by a work-related injury. An illegal alien, however, by operation of IRCA, does not have any earning power in the United States and, thus, a compensation award that stands in the place of lost wages is in conflict with federal law.

B. The Louisiana Legislature Did Not Provide for the Inclusion of Illegal Aliens Within the Workers Compensation Act.

It is pertinent to this case that the Louisiana Workers Compensation Act declined to specifically address the flow of compensation benefits to illegal aliens. The policy choice of including illegal aliens

---

[16] *Id.*

[17] *O'Regan v. Preferred Enterprises, Inc.*, 98-1602 (La. 2000); 758 So.2d 124, 128.

[18] *Brooks v. Chicola*, 514 So.2d 7, 11 (La. 1987).

within the Act requires affirmative legislation by the Louisiana legislature.[19]

* * *

Liability cannot fall upon Vaughan. It did not extend an illegal employment contract; it did not seek to conceal an illegal employment contract; it did not fail to perform a statutorily imposed duty; it was not in the position to investigate the legality of the illegal employment contract. Thus, it cannot be liable in any alleged statutory employer capacity.

CONCLUSION

Through the IRCA, as recently interpreted by the United States Supreme Court, federal law preempts the flow of benefits to an illegal alien. This is especially so in Louisiana where the legislature has failed

---

[19] The only Louisiana case to discuss the matter did so in a summary manner by stating that because there is no clear indication that the legislature intended to exempt illegal aliens from recovery under the Act, compensation benefits are due an illegal alien injured in the course and scope of employment. There is no indication that the issues raised in this memorandum were considered by that court. There is also no indication that it addressed the situation of a statutory employer as in this case. *Artiga* is more fully discussed in Section II(C). *Artiga v. M. A. Patout and Son*, 95-142 (La. App. 3 Cir. 4/3/96); 671 So.2d 1138 (The court cited La. R.S. Title 23 §§ 1035(A), 1035(B), 1035.2, 1037, 1045.)

Vaughan notes that though some states have directly responded to the decision in *Hoffman* by amending its compensation laws, Louisiana has not.

to promulgate laws to specifically include illegal aliens within the Act. Because there is no positive law that addresses the inclusion of the group, to require Vaughan to fund benefits to an illegal alien is in violation of its substantive due process rights. Claimant is not an employee of Vaughan and Vaughan did not agree to the illegal employment of claimant. For the above and foregoing reasons, liability cannot fall on Vaughan, the alleged statutory employer.

RESPECTFULLY SUBMITTED:

KEOGH, COX & WILSON, LTD.

/s/ Holly C. Hargrove

KIRK L. LANDRY, #20482
HOLLY C. HARGROVE, #29895
701 Main Street
P. O. Box 1151
Baton Rouge, LA 70821
Telephone (225) 383-3795

NO._____

STATE OF LOUISIANA
LOUISIANA SUPREME COURT

ANTONIO GARCIA RODRIGUEZ
VERSUS
INTEGRITY CONTRACTING, ET AL

ON APPEAL FROM THE
THIRD CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
SUIT NOS09-01537-WCA Consolidated
with 09-01538-WCA and 09-01539
THE HONORABLE JUDGES
PETERS, AMY AND PAINTER

WORKERS' COMPENSATION PROCEEDING

APPLICATION FOR SUPERVISORY WRIT
AND/OR WRIT OF CERTIORARI OF
VAUGHAN ROOFING & SHEET METAL, LLC

RESPECTFULLY SUBMITTED:

KEOGH, COX & WILSON, LTD.

BY: /s/ _____

KIRK L. LANDRY, #20482
701 Main Street
P. O. Box 1151
Baton Rouge, LA 70821
Telephone: (225) 383-3795
Fax: (225) 343-9612
Appeal Counsel for Vaughan
Roofing & Sheet Metal, LLC

* * *

Conflicting Decisions

The decision of the Court of Appeal, while not in conflict with any other similar decision issued in Louisiana (because there have been none, as noted above), conflicts with the decision rendered by a Court of Appeal in Virginia[3], which held that such awards were not available to illegal aliens against a statutory employer. A thorough review of the jurisprudence reveals no other decisions from any other state addressing this issue.

Still further, the decision of the Court of Appeal conflicts with a decision of the United States Supreme Court[4]. While not a workers' compensation decision, the Court of Appeal notes that

> "*Hoffman* addressed whether an undocumented workers was entitled to back pay following a termination of employment after an employer found him or her to be unauthorized to work. The Supreme Court determined that the worker was not entitled to such pay as it was contrary to federal immigration policy. In particular, such payment was contrary the Immigration Reform and Control Act of 1986."

---

[3] *Manis Construction v. Arellano*, 13 Va. App. 252, 411 S.E. 2d 233

[4] *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002)

The Court of Appeal, while declining to apply the *Hoffman* holding and Federal law as set forth in IRCA to a workers' compensation claim, simply and summarily noted:

> "While *Hoffman* contains a wealth of information regarding immigration policy, its reach does not include language indicating that a matter of state workers' compensation coverage such as this, is preempted by this policy."

Quite simply, the Court of Appeal declines to apply the clear and direct logic of United States Supreme Court jurisprudence and federal immigration law, and instead awards wage replacement benefits to an illegal alien who is precluded by both federal and state statutes from ever having earned wages in the first place.

* * *